

EXHIBIT C  
TRANSCRIPT OF ORAL ARGUMENT BEFORE HON. FORREST  
10/1/13

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DAJAAINRO Order to Show Cause  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
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IN RE: SAINT VINCENT'S  
CATHOLIC MEDICAL CENTERS OF  
NEW YORK, ET AL.,

13 MC 333 (KBF)

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New York, N.Y.  
October 1, 2013  
9:00 a.m.

Before:

HON. KATHERINE B. FORREST,

District Judge

APPEARANCES

MENKES LAW FIRM  
Attorneys for Garvey  
BY: SHERYL MENKES  
  
AKIN GUMP STAUSS HAUER & FELD, LLP  
Attorneys for St. Vincent Defendant  
BY: SARAH LINK SCHULTZ  
ANGELINE L. KOO

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1 THE COURT: Good morning, everyone. Please be seated.  
2 (Case called)

3 MS. MENKES: Sheryl Menkes, M-e-n-k-e-s, attorney for  
4 creditor Elaine Garvey and plaintiff in the state court action.

5 THE COURT: All right. Good morning, Ms. Menkes.

6 MS. SCHULTZ: Good morning, your Honor.

7 Sarah Schultz and Angeline Koo, Akin Gump Strauss  
8 Hauer & Feld, counsel for the liquidating trust Eugene I.  
9 Davis.

10 THE COURT: All right. Thank you. Good morning.

11 I am sitting as the Part One judge this week and  
12 received yesterday the order to show cause for a temporary  
13 emergency stay in the state pending appeal on behalf of  
14 creditor Elaine Garvey through attorney Menkes.

15 Am I pronouncing your name correctly?

16 MS. MENKES: Yes, your Honor, your Honor.

17 THE COURT: The matter's been assigned to Judge Abrams  
18 who was not able to take it. So Part One in this kind of case  
19 steps in and indeed Part One often does temporary emergency  
20 stays in any event.

21 I asked for you folks to come in and be heard on this  
22 immediately because of the timing of what I perceived in my  
23 very quick review yesterday of the papers and then a rereview  
24 of the papers which is the September 30th date that had been  
25 set up by the bankruptcy court pursuant to which the state

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court action by the creditor Elaine Garvey was to be withdrawn as I understand it.

MS. MENKES: Dismissed with prejudice.

THE COURT: Dismissed with prejudice. And without knowing very much about the facts here, I didn't want to grant more than a very limited emergency one day stay until I can figure out what's really going on, so that you folks can fill me in. And I didn't want to do it ex parte, so here we are.

As I understand it having been through the papers, it appears that there was an individual who passed away at a hospital which has since entered bankruptcy that, Ms. Menkes, you were hired within a month or two of the death of that patient that after the bankruptcy occurred there was, the regular claims bar process was noticed up but the information was sent, I think actually, to the hospital, perhaps, where the decedent was last I guess, in quotes, residing. And that subsequent to that there was no timely notice of claim, I guess, filed. I think that's one of the primary issues.

And then the action was commenced and there's been some scuffling back and forth about whether or not the action can be litigated in light of the automatic stay. And then there is the issue about whether or not the action can be litigated at least up to the amount of some potential coverage of insurance as to which I understand there's a dispute.

So the issue here for this Court is a very narrow one.

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And it really is whether or not there is basis upon which this Court should overturn a very learned colleague of mine, the chief bankruptcy judge's decision to require the state court action to be dismissed pursuant really to orderly bankruptcy procedure. And I've read through the transcript of that proceeding and it appeared that the bankruptcy judge had, she had very carefully gone through the various rules that are applicable here.

So for me to stay her decision is, I think, the only issue before me. It would be a temporary stay in any event -- that's all we're here for -- because any application, generally, for a stay would go before Judge Abrams. However, I don't think that if the temporary stay, if it doesn't issue I don't think there's really anything left to be done. I think that the action in the state court goes away and there may be nothing left for Judge Abrams.

So with that said, tell me if I've got the contours of the situation right, Ms. Menkes and then why don't you go ahead and address whatever you'd like to address as to why I should impose a stay

MS. MENKES: The contours are almost correct. But when the patient was served with notice of the bankruptcy proceedings he'd already been dead at least one year and the debtor's records indicated that he was deceased, that he had not been there for at least a year. And it also indicated the

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addresses of his next of kin his daughter, the current administrator and his wife.

THE COURT: Let me ask you just a couple of preliminary questions so that I can understand, get a sense of the facts. Was the patient a long term resident of that facility?

MS. MENKES: He had two admissions in 2010.

THE COURT: Was this a -- but it was a short term hospital?

MS. MENKES: No, your Honor. It was a nursing home where people are taken out of the community because they can't function in the community because they're so ill. He had psychosis and dementia. He was transferred there from a hospital.

THE COURT: All right. And when was the state court action that you were retained for first filed?

MS. MENKES: In, I believe it was in 20 -- I have to look. I believe it was 2013.

THE COURT: So why did you wait from -- as I understand it, he died --

MS. MENKES: 2010.

THE COURT: -- in 2010.

MS. MENKES: Because I had to get all the records together and get them reviewed by an expert. And according to state court law there is the insanity toll CPLR 208, someone

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who doesn't have the capacity to care for their own legal affairs has a three years statute of limitations toll from the date of their death. So his claim was timely filed.

I just wanted to add in term of a background however, that the nursing home's own records as I said, indicated the location of the next of kin.

THE COURT: And, apparently -- and this will be something that counsel for the defendant will address, the trustee I should say, the decedent was listed as a creditor.

MS. MENKES: That's correct, your Honor. He was listed as credit or. I believe it was because the administrator sent HIPAA compliant authorizations for medical records prior to any bar dates and stated on these HIPAA complaint authorizations that the purpose of the records was for litigation. Although the trustee has not come forth with a reason why he was listed as a creditor. Now for the last -- he was listed a creditor. He was served about a year with one and two -- after death and two years after death with a second notification.

According to Erie v. Thompson -- Thompsons, the federal court has to go by the state court law for substantive law in the state where they're sitting. New York Substantive Law is very clear that service of process on a dead person is a nullity and I've cited to that New York statute in my papers as well as cases. And the New York State Law is very clear that

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any action with a dead person is stayed pending the appointment of administrator.

THE COURT: Well, let me just have you pause there. Does the service of process for that point, are you tying it to when the notice of claim was served or onto something else?

MS. MENKES: No. When the notice was served onto the decedent of the bankruptcy procedures there were several different notices served to him. The debtors served themselves at their own facility. The decedent had been dead for two years.

THE COURT: That was the point I was trying to get at. Your point is that under state law the service issue goes to the service upon the decedent of the bankruptcy matters.

MS. MENKES: Of any matter, service or process.

THE COURT: But including here most importantly including what would have been notification of the bankruptcy proceeding.

MS. MENKES: Correct. It's a nullity by state law.

In addition, Elaine Garvey became the administrator of the estate and there's a bankruptcy case which I've cited to. I can look for it in my papers. The executor of estate is a

known creditor. So therefore that required actual notice. In the underlying motion that went on the bankruptcy judge ruled that the debtor acted reasonably by serving a dead person and that Ms. Garvey was an unknown creditor therefore, publication

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was sufficient.

THE COURT: Well, let me ask you, the reason that you take a position that Ms. Garvey was a known creditor is because the decedent was listed as a creditor or --

MS. MENKES: No because there's cases that say the executor of an estate, not a bankruptcy estate is a known creditor.

THE COURT: I see what you are saying.

MS. MENKES: So, based on those two issues -- well, there was also another issue. I had commenced a state court action before I knew of any bankruptcy proceedings. And it was only through the state court action when I was trying to inquire as to why I was never -- a complaint was never demanded of me cause I served a summons with notice that I hired an investigator and he said they're bankruptcy.

THE COURT: Let me just ask you -- let me probe a little bit on that. So this a Saint Vincent's hospital?

MS. MENKES: Correct. Saint Vincent's was the operator and owner of Holy Family Home where the decedent was a patient.

THE COURT: All right. Did you understand that Holy Name Homes that they were associated with St. Vincent's?

MS. MENKES: Yeah, Holy Family. There's a state court website that says that St. Vincent's is the operator of Holy Family Home which I do nursing home abuse cases. I sued the

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operator and the facility.

However, New York State Insurance Law required -- I've cited to that too in my papers -- requires that there is insurance coverage provided and bankruptcy does not absolve the need for this insurance coverage. Therefore, I also did research about if state courts could undertake this decision. And my research clearly indicated from the New York Court of Appeals and many other cases that there's concurrent jurisdiction with state courts. And they can decide the affects of the stay on third parties such as insurers. I was not -- the trustee never conclusively told me on the phone or wrote me letters that there was no insurance. However, she didn't provide me any documentary evidence and this is an adversarial proceeding and that usually is provided. And in addition she never explained why she doesn't have to adhere to the New York State Insurance Law that deems insurance coverage mandatory even if someone, a corporation or entity is in bankruptcy.

So I proceeded in state court with an order to show cause to lift the stay up to the level of the insurance policy. In states court it became known conclusively at that point that there was no insurance coverage.

I would like to add --

THE COURT: That there was no insurance?

MS. MENKES: The coverage had been exhausted. Whether SOUTHERN DISTRICT REPORTERS, P.C.

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1 or not there's insurance coverage does not absolve the tort  
2 fees of liability. It's just another pocket to pay for the  
3 injuries of the plaintiff. If you don't have insurance you  
4 have to pay it out of your own pocket. So --

5 THE COURT: But it strikes me as the real sort of the  
6 heart of the issue is whether or not the failure to file a  
7 notice of claim to essentially put the debtor in or the  
8 creditor in line is the critical issue.

9 MS. MENKES: I had asked for that and that was denied  
10 as well.

11 THE COURT: I understand. But it strikes me that we  
12 don't get to anything else unless you can get a notice of claim  
13 somehow on file.

14 MS. MENKES: Right. That's going to be in the appeal.  
15 The appeal I am going to argue there was excusable neglect.  
16 And I don't think I have to argue the merits of the appeal  
17 today. All I have to show here is chance a lot of success.

18 THE COURT: You'd better show a likelihood of success  
19 and so you've got to argue enough that it would convince me  
20 that the notice of claim that -- what --

21 MS. MENKES: Well, probably --

22 THE COURT: Hold on. I just was stumbling over the  
23 phrasing but that the notice of claim should be the failure to  
24 file the notice of claim should be excused.

25 MS. MENKES: That's what I plan on arguing in my  
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appeal.

THE COURT: Tell me why it should be excused.

MS. MENKES: OK. There are four prongs for the stay to be in place. Would you like me to argue that or why the notice --

THE COURT: The notice of claim because I think I understand --

MS. MENKES: The notice of claim there is excusable neglect because the debtor failed. The debtor has to do due diligence to locate phone creditors and provide them with actual notice of the bankruptcy proceeding otherwise this is the violation of due process. Elaine Garvey was a known creditor. She was not provided with any notice, whatsoever, and the bankruptcy held that notice by publication was sufficient.

THE COURT: Let me just -- I just want to pause there and then we'll go on to the other factors but I know that you'd said before that there's case law which holds as a matter of law that an executor is a known creditor. But how does a hospital understand that every person who died within a facility, does it have to notify every executor?

MS. MENKES: No, it's not the hospital. It's the debtor's process server has to do due diligence and the hospital's own records. There's also case law that says in order to perform due diligence a debtor doesn't have to go to

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extraordinary measure but they do have to check their own records.

THE COURT: So what would they have checked here that would have notified them that there was a claim for medical malpractice?

MS. MENKES: Well, their own records showed they had listed him as a creditor. They had served him after he died. If they knew he was a creditor their own records would show that he had left the facility in 2010 and that his next of kin was listed as, and the notices could have been forward there.

In addition, Elaine Garvey prior to the bankruptcy sent a HIPAA compliant authorization and asked for his records because for the purposes of litigation. So, that went to the medical record department. This service was an invasion of due process and proper service and it eviscerates this Court's ability to hear and determine the issue -- if the stay is not granted it would eviscerate this Court's decision to determine the issues on appeal because there would be irreparable harm to Ms. Garvey because her statute of limitations has now expired. If her case is dismissed in state court if that's dismissed with prejudice, even in this Court hears the appeal and says, and finds that she was correct, she can no longer bring her case ever again. "Dismissed with prejudice" means that's it. And there is no harm to the trustee. They've even put in their own papers mechanisms that would prevent any harm to them. For

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example, I would be in total agreement to stay the state court action, to stay any litigation in the state court action pending the determination of the appeal.

And so if you look --

THE COURT: Just and pending the determination of the appeal that would go to --

MS. MENKES: Excusable neglect.

THE COURT: Which would then allow you to file a notice of claim which would then allow you to start and to litigate the state court action and/or get in line and be more procedurally positioned to get a lifting of the stay.

MS. MENKES: Because it's my understanding that the bankruptcy court cannot determine damages. There's a case -- I don't recall the name offhand but it either has to go to district court or state court. They can't --

THE COURT: Well, that isn't for today.

MS. MENKES: Yeah. So if the stay is granted of dismissing her case pending the outcome and determination of the appeal, then if the Court on appeal says, no, she is not entitled, then it can be dismissed but at least she has the right to be heard and have that determination made by an appellate court.

THE COURT: What's your understanding of how long it would take to wind its way, the appeal would take to wind its way through the appellate division or through the district

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court?

MS. MENKES: Well, it's already been assigned an index number. It's been assigned a judge.

THE COURT: Who is it in front of?

MS. MENKES: I want to say Judge Glover. Is there a Judge Glover?

THE COURT: No. Gardephe?

MS. MENKES: They it had written on my --

MS. SCHULTZ: Your Honor, if I could help? It's in front of Judge Castel.

THE COURT: Oh, all right. OK.

MS. MENKES: And so the next step is to get a briefing schedule. It is my understanding that these appeals go very fast, that we had 14 days to file. 14 days to give us the issues. Now as soon as we get the briefing schedule we'll get near 14 days to put in the papers. I would not think that it would take more than a month or two.

THE COURT: All right. And what's your understanding? And then let me hear from the counsel for the trustees. What's your understanding of, if you have one, of the timing of the bankruptcy?

MS. MENKES: I don't understand.

THE COURT: When is the bankruptcy proceeding going to be wrapped up? Are you going to be the last thing that prevents this from being --

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MS. MENKES: I don't know.

THE COURT: OK. It is not unusual that you don't know. It's not your bailiwick but I was wondering if you'd had a sense of timing that you'd learned.

MS. MENKES: If she was in line as a creditor she'd get whatever the other creditors were entitled to whatever percentage of the dollar based on --

THE COURT: I just don't know how late in the game she's coming in.

MS. MENKES: I honestly don't know, your Honor.

THE COURT: Let me hear from Ms. Schultz. You can start where ever you'd like but I would like to get a sense of the bankruptcy proceeding, where it stands, how far along it is and whether or not a quick appeal to Judge Castel really does any significant harm to that process.

MS. SCHULTZ: Sure, your Honor. I'm happy to start there and then there are a couple of other points I would like to rebut and then some other points I'd like to make.

THE COURT: Absolutely.

MS. SCHULTZ: So, first with respect to where we're at in the bankruptcy process, your Honor, I reported to the bankruptcy court on the 19th of September, which was the last time we were before them and we have 18 liquidated climb claims remaining to resolve. We have a number of unliquidated claims to resolve as well. But as soon as we've resolved those

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1 remaining claims we anticipate being in a position to make our  
2 initial distribution using creditors that have been waiting  
3 since 2010 to receive a distribution. And the reality is that  
4 if we've got one more large claim, the alleged amount, although  
5 there's been nothing but just an allegation contained in the  
6 complaint that we were eventually served in the state court  
7 action is a ten million dollar claim alleged by Ms. Menkes.  
8 And it's a period that straddled the pre and the post petition  
9 period. So we don't know if that's an admin claim, if it is an  
10 unsecured claim. And so the reserve that we would be required  
11 to make in connection with that would almost certainly make it  
12 impossible for us to recommend the liquidating trustee that  
13 they make a distribution to the creditors that have timely  
14 filed.

15 THE COURT: Let me just make sure I understand that  
16 the 18 liquidated claims are getting ready to have a  
17 distribution paid, there or thereabouts. And you anticipate to  
18 happen in the relatively near future?

19 MS. SCHULTZ: It's not actually just those. Those are  
20 the claims that remain to be resolved. It's our entire  
21 unsecured creditor body. So we're talking thousands of claims,  
22 literally. We'll be receiving their initial distribution. Our  
23 goal is to make it during the fourth quarter of 2013.

24 THE COURT: All right. Which is in a couple of  
25 months.

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All right. So now, the reserve that you'd be required on a ten million dollar claim to advise your client to retain would have an impact on all distributions.

MS. SCHULTZ: It would, your Honor, and it would, in fact, potentially determine whether I can make a distribution or not, whether we'd be able to make one. We need to spend some time, some more time with our -- we have a claims analysis group that helps us with any of these med-mal claims.

To the extent that a claim straddles the pre and the post petition period the amount that you would have to reserve for post the petition period is different than the amount you have to reserve for the pre-petition period. And so we would potentially need to reserve a significant amount pending the resolution of this appeal.

THE COURT: Let me just pause there. And I am just going to ask some questions as we go, which is what if -- and I am not suggesting that this solves it. I want to see how much maneuver room there is. What if Ms. Menkes was able to give some assurance that she would not be seeking for the period that is most troublesome for you? I don't know if -- I assume it's the pre-period, not the post period.

MS. SCHULTZ: It's the post period actually. If she was able to give that assurance, your Honor, I think that would help because it would help us with the amount of the reserve that we would need to make. I am not sure that it solves the

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problem. I know it's --

THE COURT: How much does it help? Does it allow you to make a distribution? Does it take away that?

MS. SCHULTZ: It might.

THE COURT: So let me go with number two. So one thing is if Ms. Menkes is able to say that the pre-period is what she is looking for and the not post period that then solves part of the problem. What if she's also able to say that after three years of looking at these records she's not looking for ten million dollars, she's really looking for two million or \$1.5 million maximum and that therefore that also then helps bring down the amount that we're talking about, does that then help you?

MS. SCHULTZ: If she was able to give a more refined request and demand, that would help, yes.

THE COURT: All right. Now, let me turn to Ms. Menkes. Are you able to do either of those two things because if you are it sounds like the major point that the trustee is making which is a significant one is that you could otherwise be a hold up to any distributions.

MS. MENKES: Your Honor, that ten million would be a damn and they're usually very large. I could easily adjust this down and would be willing to even settle with their claims people rather than go through long and protracted litigation.

THE COURT: That I can't deal with as part of the SOUTHERN DISTRICT REPORTERS, P.C.

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proceeding today.

MS. MENKES: The answer is, yes, I definitely can decrease the ad damnum clause.

THE COURT: Can you get it down to 1.5?

MS. MENKES: Yes, I can.

THE COURT: And then an ad damnum. And then can you say the post period is not an issue?

MS. MENKES: The post -- well, he left the facility pre-petition.

THE COURT: Yeah, so?

MS. MENKES: So. He died pre-bankruptcy. He died in June 2010.

MS. SCHULTZ: The bankruptcy was filed in April, your Honor.

THE COURT: He died in June. The bankruptcy was filed in April of '10?

MS. SCHULTZ: Um-hmm.

THE COURT: It is a post petition filing.

MS. SCHULTZ: It's a post petition pre-confirmation claim and I think, perhaps, that's the confusion.

THE COURT: I right. So how does that, Ms. Schultz, impact things? So, we can get the ad damnum down to a much lower level does that help you in terms of the reserve, you know for the post period?

MS. SCHULTZ: It does help. What I was going to say, SOUTHERN DISTRICT REPORTERS, P.C.

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your Honor, I know it's difficult when you think of an organization that's as large as St. Vincent's and everybody assumes that the kind of cash we are sitting on is hundreds of millions of doors. It's not.

THE COURT: I don't make that assumption.

MS. SCHULTZ: It's a bankrupt entity and we're doing the wind down. The reality is the amount that the estate is sitting onto be distributed is ten to \$15 million, not hundreds of millions. So it certainly helps. I would need to sit with the trustee to determine if that got us to where we could make a distribution but it definitely gets us much closer to being able to make one to have that amount down.

THE COURT: All right. Go ahead and make your other points.

MS. SCHULTZ: Okay. One point that I'd like to clarify and I think this is important because Ms. Menkes asserted that she was going to argue in the context of her appeal that she had mapped what we in the bankruptcy parlance call the Pioneer standard which is the standard for filing a late filed proof of claim, Judge Morris was very clear at the September 19 hearing -- and I'm reading from the transcript on page 61 on 22.

THE COURT: But Ms. Schultz, if you do read you have to slow down.

MS. SCHULTZ: I am sorry. Just so you know, a late SOUTHERN DISTRICT REPORTERS, P.C.  
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1 proof of claim or a proof of claim has never been argued. It's  
2 not been decided. It has not been ordered. And I note that  
3 only that Ms. Menkes still has that available. She's never  
4 made that motion before the bankruptcy court. If her  
5 contention is that she should be able to file a late filed  
6 proof of claim and assert a claim against the bankruptcy court  
7 she needs to go to Judge Morris and file a motion that  
8 establishes that she's met the Pioneer standard which is the  
9 standard for filing a late filed proof of claim. And I think  
10 Judge Morris was very clear that she's not determined that yet.

11 THE COURT: All right. So let's just pause right  
12 there. That suggests if you are right, Ms. Schultz, a reason  
13 to grant a temporary stay because it would be suggestive of a  
14 motion which could be made which has not been decided upon by  
15 the bankruptcy court but cannot be if the action is dismissed.  
16 Because what we're dealing with on the one hand as I understand  
17 it but tell me if your view is different from this, is that  
18 I've got Ms. Menkes arguing that if she is required to go  
19 across the street and dismiss her claim with prejudice, it is  
20 gone forever and creditor Garvey has no longer has a claim and  
21 she would have no standing therefore to go to the bankruptcy to  
22 make such a motion. So I think that unless a stay is issued  
23 she could never make the motion you've just described.

24 MS. SCHULTZ: Respectfully I disagree. So I think  
25 that she is prohibited from going before the state court, your

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Honor, and seeking to go after insurance which does not exist. But she is not prohibited from seeking to file a proof of claim before the bankruptcy court which would be liquidated as a claim against this entity. And if the bankruptcy court says yes, you've met the Pioneer standards, you've established excusable neglect with respect to your client's failure to timely file a proof of claim --

THE COURT: But how -- tell me this, if you've got a medical malpractice related claim as to which the damages, if any, or the liability first and then the damages, if there is liability, flow from a determination, judicial determination of some sort, how do you file a proof of claim that has a sum certain attached unless you have such a proceeding? I suppose you can file the ad damnum amount but you've got to get yourself down to an actual amount.

MS. SCHULTZ: We have a procedure for that. So we have a court approved procedure that would require then us to go through a series of offers first. It begins with liquidating trustee sending the plaintiff an offer. The plaintiff responds in writing. Liquidating trustee then has one more option to respond. If the parties don't reach settlement we then automatically go to mediation because we recognize the bankruptcy court's inability without the consent of the parties to enter an order adjudicating a personal damages claim. We go to mediation. There are, there's three

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or four mediators that were approved. The plaintiff gets to select the mediator. At the conclusion of the mediation, if the medication is unsuccessful then the plaintiff has the discrimination to either have the claim estimated by the bankrupt court or we can go to district court.

THE COURT: District court?

MS. SCHULTZ: Federal court.

THE COURT: Yes. But not on a med-malpractice claim but on the bankruptcy issue.

MS. SCHULTZ: On the determination of amount of the claim which would require the district court to look at the claim and say this is the appropriate amount and this is how much you're entitled to assert against the estimate.

THE COURT: All right. So it's almost like a med-malpractice claim within a claim. You're making it through a bankruptcy proceeding and it would be sort of an appeal to the district court but it would be effectively making a med-malpractice determination.

MS. SCHULTZ: That's correct, your Honor.

THE COURT: All right. So let me then make sure I understand the point which is that the gating factor to the procedure that you've just described which would be an alternative route to coming up with an amount, if any, is appropriate requires, first, that a motion be made to the bankruptcy court for excusable neglect and that a late notice

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